ROSS W. MATHEWS

IBLA 80-226 Decided May 29, 1980

Appeal from decision of the Utah State Office, Bureau of Land Management, declaring certain mining claims abandoned and void (3833).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

   Under 43 U.S.C. § 1744(b) (1976) and 43 CFR 3833.1-2, the owner of an unpatented mining claim located on or before Oct. 21, 1976, must have filed a copy of the official record of the notice or certificate of location of the claim with the proper Bureau of Land Management Office on or before Oct. 22, 1979, or the claim will be deemed conclusively to be abandoned and void under 43 U.S.C. § 1744(c) (1976) and 43 CFR 3833.4.

2. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

   Pursuant to 43 CFR 3833.2-1(a), the owner of an unpatented mining claim located on or before Oct. 21, 1976, must have filed in the proper BLM office on or before Oct. 22, 1979, or on or before Dec. 30 of each calendar year following the calendar year of

such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

APPEARANCES: Ross W. Mathews, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ross W. Mathews appeals from the November 16, 1979, decision of the Utah State Office, Bureau of Land Management (BLM), which rejected for filing certificates of location for the Orma-VaLoy Nos. 1-5, 31, and 32 lode mining claims as having been untimely filed under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the pertinent regulations, 43 CFR 3833.1-2 and 3833.2-1. As the documents relating to the mining claims were received by the State Office on October 29, 1979, the claims were declared to be abandoned and void. 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4.

Appellant states that delay in delivery of the documents to the State Office was caused by BLM's refusal to accept the original envelope containing the documents and to pay the postage due charge of 22 cents thereon.

The answer to the question whether the tender by the postal service t BLM of the envelope dispatched by appellant on October 15, 1979, constituted a filing of appellant's certificates of location turns upon whether it was improper for BLM personnel to refuse to pay the postage deficiency before delivery of the envelope would be made. The Postal Service Manual at 146.31 states that postage due on mail is to be collect in cash before delivery of the item will be made to the addressee. BLM personnel were under no obligation to pay the postage due on any mail addressed to the office, nor could appellant reasonably have expected anyone in BLM to defray the cost of the postage for him. It was solely t responsibility of appellant to affix the proper amount of postage to the envelope containing his notices of location. He cannot shift any part of that responsibility to personnel of BLM. See David G. Berger, 61 I.D. 51 (1952).

In necessarily follows that refusal by BLM personnel to pay the postage due on the envelope dispatched by appellant from Caliente, Nevada on October 15, 1979, was not improper, and that the tender of that envelo to BLM by the postal service subject to payment of the postage due on it did not establish a timely filing of the mining claim location notices contained in the envelope.

The Orma-VaLoy Nos. 1-5 claims were located on July 21, 1954, and the Orma-VaLoy Nos. 31 and 32 on November 23, 1963.

Section 314 of FLPMA, 43 U.S.C. § 1744 (1976), requires that the owne of an unpatented mining claim located prior to the date of the Act (Octob 21, 1976) shall, within the 3-year period following that date (on or befo October 22, 1979), file with the office designated by the Secretary of th Interior a copy of the official record of the notice or certificate of location, including a description of the location of the mining claim sufficient to locate the claim on the ground, and affidavits of the assessment work performed on the claim or a notice of intention to hold t claim.

[1, 2] The pertinent regulations, 43 CFR 3833.1-2 and 3833.2-1, implement section 314 of FLPMA and provide in part as follows:

> § 3833.1 Recordation of mining claims.
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> * * * * * * *
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> [§] 3833.1-2 Manner of recordation -- Federal lands.
>
> (a) The owner of an unpatented mining claim * * * located on or before October 21, 1976, on Federal lands * * * shall file (file shall mean being received and date stamped by the proper BLM Office) on or before October 22, 1979, in the proper BLM Office, a copy of the official record of the notice or certificate of location of the claim or site filed under state law.
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> § 3833.2 Evidence of assessment work--notice of intention to hold a claim or site.
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> * * * * * * *
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> § 3833.2-1 When filing required.
>
> (a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

Appellant did not timely file a copy of the official record of the notice or certificate of location for each claim as required by 43 CFR 3833.1-2, nor did he timely file evidence of annual assessment work as required by 43 CFR 3833.2-1. It was thus proper for BLM to declare the subject mining claims abandoned and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appeal from is affirmed.

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Douglas E. Henriques
Administrative Judge

I concur:

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Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I would hold that appellant substantially complied with the statute and regulation. The seven possibly valuable mining claims should not be held presumptively abandoned because of the 22 cents postage due. The claimant made a good faith, timely attempt to comply with statute and regulation. The purposes of the statute were satisfied. Congress would never have intended the claims to be abandoned in such circumstances. Th Supreme Court, in El Paso Brick Co. v. McKnight, 233 U.S. 250, 258-59 (1914), has afforded ample authority for the exercise of a more reasonabl discretion:

> That decision (37 L.D. 155), though supported by some Departmental rulings of comparatively recent date, was in conflict with the established practice of the Land Department, and was expressly and by name overruled, on July 29, 1911, in Ex parte Stock Oil Company, 40 L. D. 198, which reaffirmed prior decisions to the effect that irregularities in proof, including the execution of affidavits before other than the designated officers, might be supplied, even on appeal.
>
> These and similar rulings, previously followed in the Department, are manifestly correct. They accord with the policy of the land laws, under which the United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. United States v. Marshall Mining Co., 129 U.S. 579, 587. [Emphasis added.]

A presumptive inference of an intent to abandon is a sui generis concept. Under El Paso Brick Co., supra, the claimant has an ongoing relationship with the Federal Government; he is seeking no new right. It may be that claimant has performed assessment work on the Orma-VaLoy Nos. 1-5 lode claims since 1954, and on Nos. 31-32 since 1963, and has made th filing required in 43 U.S.C. § 1744(a)(1) (1976). Under the circumstance here, we should not hold that appellant has abandoned any claim for which he has made the section 1744(a)(1) filing.

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Joseph W. Goss
Administrative Judge